

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
THIRD REGION**

NEW YORK STATE UNITED TEACHERS,

Employer

and

Case 3-UC-527

**COMMUNICATIONS WORKERS
OF AMERICA, LOCAL 1141,**

Petitioner

**DECISION AND ORDER CLARIFYING
BARGAINING UNIT**

The Petitioner (herein, CWA) seeks to clarify a currently recognized bargaining unit (Unit) to include the newly-created position of confidential assistant to the director of communications. Employee Harriet Juron has occupied this position since July 2007. Before assuming her current position, Juron held the bargaining unit position of administrative assistant in the Employer's communications department. The Employer (herein, NYSUT) opposes clarification of the Unit and takes the position that Juron should be excluded from the Unit because she is a confidential employee. NYSUT contends that because Deborah Ward, its director of communications, formulates, determines and effectuates labor relations policy, Juron, who assists Ward, is a confidential employee. Alternatively, NYSUT argues that Juron is a confidential employee because she, in the course of her duties, regularly has access to

confidential information concerning anticipated changes that may result from collective-bargaining negotiations. As explained herein, I find that Juron is not a confidential employee, and clarification of the Unit to include her is appropriate.

Pursuant to Section 3(b) of the Act, the Board has delegated its authority herein to the undersigned. A hearing was held in this matter on March 28 and 31, 2008. The hearing officer's rulings are free from prejudicial error and are affirmed.

At the hearing it was stipulated, and I find, that NYSUT is a not-for-profit corporation engaged in the business of a labor organization representing teachers and other professionals in New York State. Annually, NYSUT derives from its operations gross revenues in excess of \$250,000. Annually, NYSUT purchases and receives, at its Latham, New York headquarters and its regional offices throughout New York State, goods and services valued in excess of \$50,000 directly from points located outside the State of New York. Based on the parties' stipulation, I find that NYSUT is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act. The parties further stipulated at the hearing, and I find, that CWA is a labor organization within the meaning of Section 2(5) of the Act.

FACTS

NYSUT's Operations

As a labor organization, NYSUT represents approximately 600,000 employees. NYSUT employs approximately 530 individuals at its headquarters office in Latham, New York, near Albany, New York and in its 16 regional offices throughout the state.

The bargaining unit represented by CWA consists of:

[A]ll full-time and part-time general staff personnel, but excluding all of the following: all temporary employees, all managerial employees, all confidential personnel, all professional staff employees of NYSUT, and those part-time employees hired on a casual basis.

NYSUT and CWA have had a collective-bargaining relationship for over 30 years. NYSUT also has collective-bargaining relationships with two other unions, the Professional Staff Association (PSA) and the Legal Staff Association (LSA). The current collective-bargaining agreement with the PSA was extended in 2006 and expires on August 31, 2009. The current LSA agreement was also extended in 2006 and expires on March 31, 2010.

Delegates to NYSUT's representative assembly elect its board of directors, which consists of approximately 70 individuals. Officers, who are also elected, are headquartered in Latham, New York. Richard Iannuzzi is the president of NYSUT. There is an executive vice-president, three other vice-presidents, and a secretary/treasurer. The board of directors meets four times each year. An executive committee of the board meets monthly. The executive committee consists of ten directors; the officers and the executive director are *ex officio* members of the committee.

NYSUT's headquarters operations are administratively organized into several departments, including the communications department. Deborah Ward, to whom Juron is confidential assistant, is the director of communications.

Ward does not sit on the board of directors or on its executive committee. There is considerable testimony in the record about two other bodies on which Ward does sit, the "cabinet" and the officers communication committee (OCC).

The cabinet is an advisory group that consists of NYSUT's officers and several "key" staffers. The latter group currently includes the executive director, the director of administration and finance, counsel to the president, the director of legislation and political action, the director of program services, the director of research and program development, and the director of communications. Ward has been a member of the cabinet since about February 2007, when she

assumed her current position.¹ Before she became a member of the cabinet, Ward attended its meetings at times. When NYSUT was negotiating new agreements with CWA and the PSA in 2003, there was informational picketing by the PSA, and a strike was thought possible. Ward was invited to cabinet meetings to discuss NYSUT's approach to the media (e.g., fashioning press releases, responding to media inquiries). There is no evidence in the record that Juron, whose position is at issue here, has attended cabinet meetings.²

The OCC has existed for approximately 12 years. Ward has chaired this committee since its inception. The committee consists of NYSUT's officers and several managers from its various departments.³ The committee evolved from what was called the *New York Teacher* story meeting, where the content of that publication was discussed. As communications technology evolved, Ward became director of publications, web and video, and the committee's focus widened accordingly.

Twice, during 2006, Ward brought a CWA unit employee (not Juron) with her to OCC meetings, to take notes. Executive director Kinsella testified that she advised Ward against doing so, because of the "rather sensitive" nature of the discussions, which "in some instances had to do with our labor relations functions..."⁴ Currently, Juron attends OCC meetings.

Kinsella testified about the labor relations functions of the cabinet. During collective-bargaining negotiations with its PSA in 2003, NYSUT proposed for the first time that employees

¹ Ward, who has been employed by NYSUT for 16 years, was previously manager of media relations. Her responsibilities have included editing the *New York Teacher*, a NYSUT periodical, NYSUT's web page and video production. The director of communications position was created as part of an administrative reorganization that followed the state-level merger of NYSUT with the National Education Association (NEA New York) in 2006.

² Beyond the board of directors, its executive committee, and the cabinet, NYSUT's administrative structure and governance "gets complicated," as executive director Kinsella testified. According to Kinsella, the cabinet is the "smallest and highest level strategic planning group in the organization." The next highest level is the officers' advisory committee, which consists of the cabinet, plus additional managers who do not sit on the cabinet. An administrative committee consists of all management staff in the organization. Kinsella testified that Ward participates in all of these groups. There was no detailed testimony about the officers advisory committee or the administrative committee, or what labor relations functions, if any, they have.

³ The record does not reveal how many of these managers are on the committee, their names or their titles.

⁴ Kinsella did not give examples of "sensitive" matters, or what "labor relations functions" the OCC has.

in that unit assume part of the cost of health insurance. There was a strongly negative reaction from the PSA, and there was picketing activity at NYSUT's headquarters. Ward was not a member of the cabinet at that time, but she was included in its discussions about how to respond to the LSA action. Ward's role was to advise the cabinet on how to approach the media, with a view to putting NYSUT in the best possible light with the public and its local leaders.⁵

Similarly, in or about March 2008, Ward (a cabinet member at that time) advised the cabinet on handling media inquiries in the event that the LSA unit in the New York City area carried out its announced intention to picket, in a dispute over attorneys' workload. The LSA did not picket; the dispute was at least temporarily resolved. Kinsella acknowledged, on cross-examination, that Ward did not determine the attorneys' workload or negotiate the resolution of the dispute.

The state-level merger of NYSUT and NEA (National Education Association), which was completed in September of 2006, raised numerous questions about the handling of labor relations (e.g., the integration of NEA staff, salary scales) during and after the merger, and these issues were discussed in cabinet. Ward was not on the cabinet at the time, but Kinsella testified that it would be "fair to say" that Ward would have been privy to these discussions, had she been on the cabinet.

Kinsella is NYSUT's lead negotiator in bargaining with each of the three units. There is cabinet discussion of proposals, bargaining strategy and the total dollar cost of possible wage proposals, in preparation for bargaining. However, it is Kinsella, together with NYSUT's president, Iannuzzi, and its director of administration and finance, Robert Wisniewski, who decides the "outside parameters" of what would be acceptable, economically, in a collective-

⁵ Later in 2003, Ward was also involved in the cabinet's discussion of how to respond in the event that a similar action was undertaken by the CWA unit, but no such action was taken by the CWA.

bargaining agreement.⁶ During negotiations, Kinsella testified, Ward remains up to date on the status of bargaining, and the parties' positions, in order to craft her message to the media in an informed way.

During Ward's tenure as director of communications, and while she sat on the cabinet, pending grievances and the restructuring of the CWA salary schedule have been "discussed" in the cabinet.⁷

Kinsella also testified regarding Ward's labor relations functions apart from her participation on the cabinet. Ward has authority to respond to grievances at the first step; has "conferred" with Kinsella on how to handle, e.g., extended sick leave, education leave and tuition reimbursement; and has "expressed concern" to Kinsella about performance issues that might give rise to discipline. At Ward's suggestion to president Iannuzzi, an employee who had attendance problems was transferred to the communications department instead of being terminated.⁸

Ward's testimony about her role in the cabinet, in regard to labor relations matters, was consistent with Kinsella's. Regarding the OCC, Ward testified that the committee formulated "crisis plans" when a strike by the PSA appeared likely. The plans were designed to keep the communications department functioning in the event of a strike.⁹ According to Ward, there were "discussions" in the OCC of the NEA merger, particularly of integrating NEA staff into NYSUT's communications department.

⁶ There is no evidence that Ward is involved in these discussions.

⁷ The record does not reveal, with any more specificity, what the substance of those discussions have been, or whether they resulted in the adjustment of any grievance.

⁸ This occurred before Ward assumed her current position. Currently, Juron "mentors" this employee. That is, she monitors the employee's attendance and performance to help the employee improve in both areas.

⁹ On cross-examination, Ward agreed that her role in the 2003 PSA negotiations, and the picketing by the PSA, was limited to communications with the public; she agreed that she was not involved in the formulation of the controversial health insurance proposal. Ward acknowledged that she was not involved in the resolution of the more recent dispute with the LSA over attorneys' workloads and that she does not determine their workloads. Again, her role in the dispute was to be conversant with, and to communicate to the public, NYSUT's positions.

Without elaboration, Ward testified that she speaks directly with NYSUT president Iannuzzi on confidential matters as they arise.

Ward also testified about Juron's duties and functions as confidential assistant. The announcement, or posting for the position, and a typed summary of Juron's duties were entered in evidence. Among the responsibilities listed on the position announcement, dated June 26, 2007, are "prepares confidential documents and correspondence," and "maintains departmental personnel records and confidential files of the director, including notes relates (sic) to employee/labor relations issues, board of directors, web and budget materials." The summary of Juron's duties consists of a "bullet" list that Ward testified she prepared.¹⁰ Among these are "Maintain personnel files; handle personnel support," "Attend Communications/NY Teacher meetings with officers, taking notes and following up," Monitor Deb's e-mail and Communications Dept. e-mail request line (to be established shortly)," and "Attend managers' meetings."

Ward described Juron's duties, in connection with the OCC meetings and in general. In the OCC meetings, Juron takes notes on "anything that comes up...anything that is resolved in terms of strategy, policy, or requires follow up action, so that at the end of the meeting, she can disperse assignments as needed and information to staff or manager(s)." Juron files documents generated by OCC meetings. Juron has access to all of Ward's e-mail messages, and is authorized to "proxy" them (i.e., open, read and respond to them as necessary). Juron maintains personnel files in the communications department, and handles confidential correspondence. Proffered as examples of confidential correspondence that Juron handles, Ward testified that she is currently drafting a proposal for managers' salaries, and that she had Juron prepare for

¹⁰ Ward was uncertain, but she believed that she prepared the document after Juron had assumed her current position.

managers a summary based on notes of her conversation with NYSUT president Iannuzzi, regarding the potential job action by the LSA. Ward testified that Juron “handle(s) drafting” evaluations, but it appears from the record that these evaluations are of managerial employees, and not of employees from the CWA or the other bargaining units.

Juron gave limited testimony at the hearing. She testified about conversations she had with Ward, wherein Ward described to her the duties of the new confidential assistant position: to “proxy” Ward’s e-mail, keep her calendar and make travel arrangements, run staff meetings with the CWA unit employees,¹¹ monitor the workload of CWA staff, schedule their lunches, reassign work as needed, and to set up procedures to ensure telephone coverage and call-in procedures.

Regarding her participation in OCC meetings, Juron testified that she takes notes and reminds participants of follow-up actions to be taken. As to the content of OCC meetings, Juron testified that “There’s, you know, political – there’s a lot of talk about politics and the budget and things like that.” After meetings of the cabinet, which Juron does not attend, Ward gives her files, or notes from the meeting, to Juron for filing¹². Juron answered affirmatively when asked whether she ever had “discussions with (Ward) about the issues.”¹³

Juron testified that she has handled e-mail messages and medical release forms in connection with an employee’s request for extended medical leave. Ward has instructed Juron that certain information she has access to is not to be shared by her with unit employees, but the record does not reveal what kinds of information were covered by this directive.

¹¹ Juron did not testify in any detail about what is involved in “running” staff meetings.

¹² These files and notes were not described in detail.

¹³ The issues discussed by Ward and Juron were not described in Juron’s testimony.

ANALYSIS

The Act does not define “confidential employee.” For over fifty years, the Board has, on policy grounds, excluded from collective-bargaining units those employees who assist and act in a confidential capacity to persons who formulate, determine and effectuate management policy with regard to labor relations (i.e., “qualifying persons”). B.F. Goodrich Co., 115 NLRB 722, 724 (1956). The test set forth in B.F. Goodrich is commonly referred to as the “labor nexus test.”¹⁴ The Board also excludes from bargaining units, for the same policy reasons, those individuals who have regular access to confidential information concerning anticipated changes that may result from collective bargaining, irrespective of whether they assist a qualifying person. Pullman Standard Division of Pullman, Incorporated, 214 NLRB 762, 762-763 (1974); Inland Steel Company, 308 NLRB 868, 872, 877 (1992). Confidential employees, though they may be excluded from bargaining units, enjoy the protections of the Act. Peavey Co., 249 NLRB 853, fn. 3 (1980). For this reason, the Board’s guidelines for excluding employees asserted to be “confidential” are strict; a broader test would operate to needlessly deprive many employees of their right to bargain collectively under Section 7. Dun & Bradstreet, Inc., 240 NLRB 162, 163 (1979); Ryder Student Transportation Services, Inc., 336 NLRB 882, 889 (2001). The burden of establishing that an employee should be excluded as confidential is on the party asserting confidential status. Crest Mark Packing, 283 NLRB 999 (1987).

NYSUT argues that Juron should be excluded from the CWA unit as a confidential employee based on either the labor nexus test or the alternative test of Pullman Standard Division and related cases. I find for the reasons set forth below, that NYSUT has not met its burden to establish Juron is a confidential employee.

¹⁴ The Supreme Court approved the labor nexus test in NLRB v. Hendrix County Rural Electric Membership Corp., 454 U.S. 170, 189 (1981).

The indicia of a qualifying person, under the labor nexus test, are stated in the conjunctive: one must “formulate,” “determine” *and* “effectuate” labor relations policy. Weyerhaeuser Co., 173 NLRB 1170, 1172 (1969); Holly Sugar Corp., 193 NLRB 1024, 1025 (1971). As director of NYSUT’s communications department, Ward responds to grievances at the initial stage and passes on, e.g., requests for extended leave. Even if it is assumed that Ward “effectuates” labor relations policy, the evidence does not support a finding that Ward either “formulates” or “determines” labor relations policy. Ward is not a “qualifying person” under the labor nexus test.

The fact that Ward reports directly to NYSUT’s president, Iannuzzi, (as do other department heads), does not in itself compel a conclusion that she formulates or effectuates labor relations policy. NYSUT argues on brief that Iannuzzi has consulted Ward on “sensitive labor relations issues, from terminations to management strategy regarding labor union job actions.” However, the record evidence reveals only that Ward suggested a transfer of one employee as an alternative to termination. Merely suggesting the transfer of an employee as a solution to a personnel problem is not “formulating” or “determining” labor relations *policy*. With regard to job actions, there is no evidence that Ward has been consulted by Iannuzzi on anything other than NYSUT’s media response to such events.

Similarly, while the record reveals that the cabinet, as a body, makes consensus decisions on such labor relations matters as bargaining strategy, the record evidence does not establish that Ward’s role in that body has gone beyond her area of expertise, media relations.¹⁵ Indeed, there have been no collective-bargaining negotiations since February 2007, when Ward became the

¹⁵ Much of the testimony about the labor relations functions of the cabinet was phrased in terms of what is “discussed” there. It is not clear from the record how intricately involved the cabinet is, and at what levels, in the bargaining process. It is clear that executive director Kinsella is the chief negotiator, and that she, the president and the director of administration and finance determine the “parameters,” as Kinsella put it, of NYSUT’s bargaining position. Ward is not involved in the determination of these parameters.

director of communications, because none of the agreements between NYSUT and its unions expires before 2009. Apart from the fact that the cabinet in some way formulates bargaining strategies and proposals, (how is not clear from the record evidence), and the fact that Ward is expected to remain on the cabinet when the negotiation cycles begin again, there is no evidence on which to rest a finding that she presently has, or will have, authority to formulate, determine and effectuate labor relations policy in regard to collective bargaining. See: Curt Gowdy Broadcasting, Inc., d/b/a KOWB Radio, et al., 222 NLRB 530, 531 (1976) (mere possibility that the individual will become involved in formulating, determining and effectuating labor relations policy too speculative to satisfy the labor nexus test).

Firestone Synthetic Latex Corp., 201 NLRB 347 (1973) and E and L Transport Company, 327 NLRB 408 (1998), on which NYSUT relies, are distinguishable from this case. In both of those cases, the individuals asserted to be qualifying persons, unlike Ward, clearly met the labor nexus test. In Firestone, some of the individuals in question served on a management committee that was responsible for formulating contract proposals. Others served on negotiating committees. The terminal manager in E and L Transport was the highest-ranking member of management on site, adjusted grievances at the local level, and negotiated agreements with the union. In the instant case, there is no evidence establishing that Ward is or will be engaged in formulating contract proposals, engages in negotiations or has adjusted grievances.

Nor do Ward's activities on the OCC establish that she is a qualifying person. On brief, NYSUT characterizes the OCC as a "deliberative and decision making body...which, like the cabinet, has considered management's strategy regarding job actions." Again, however, the OCC's deliberations and decisions have concerned how NYSUT can best present its message to the public and the media.

Because Ward does not formulate or determine labor relations policy, she is not a qualifying person. Thus, Juron may not be excluded from the Unit on the basis that she assists Ward. I find that, under the labor nexus test, Juron is not a confidential employee.

Juron is not a confidential employee under the alternative Pullman test.

It is undisputed that Juron is exposed to, handles and works with information that may be considered “confidential” in the everyday sense of the word. The law is clear, however, that mere access to confidential information does not warrant excluding an employee from a bargaining unit. Bakersfield Californian, 316 NLRB 1211, 1212 (1995). Moreover, even regular access to confidential information will not exclude an employee under Pullman and Inland Steel, unless that information concerns anticipated changes that may result from collective bargaining.

The petitioned-for estimating department employees in Pullman had regular access to information concerning the employer’s labor and material costs. The petitioner also represented a unit of the employer’s production and maintenance employees. The Board held that the estimating employees were confidential and dismissed the petition because premature disclosure of the employer’s costs would prejudice its bargaining position with the production and maintenance unit. 214 NLRB at 763.

The record evidence does not establish that Juron has regular access to the sort of information that would prejudice NYSUT in its negotiations with CWA. Juron prepares documents and correspondence that are deemed confidential, maintains Ward’s files and departmental personnel files, is authorized to access and “proxy” Ward’s e-mail, and she attends and takes notes at OCC meetings. But the Board has held that these kinds of duties do not operate to exclude an employee as confidential. Los Angeles New Hospital, 244 NLRB 960, 961 (1979). Juron has access to information that might ordinarily be considered confidential.

However, unlike the estimating employees in Pullman, Juron does not have access to the kind of information that concerns anticipated changes that could result from collective bargaining.

Under the alternative Pullman test, therefore, Juron is not a confidential employee.¹⁶

For the reasons set forth above, the bargaining unit represented by Communications Workers of America, Local 1141 is clarified to include the position of confidential assistant to the director of communications.

ORDER

IT IS HEREBY ORDERED that the bargaining unit represented by Communications Workers of America, Local 1141 is hereby clarified to include the position of confidential assistant to the director of communications.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570-0001. This request must be received by the Board in Washington, DC by 5 p.m. EDT on **June 10, 2008**. The request may be filed electronically through the Agency's web site, www.nlrb.gov,¹⁷ but may not be filed by facsimile.

¹⁶ On brief CWA argues, based on a provision of the parties' collective-bargaining agreement, that NYSUT has waived its right to assert that Juron is a confidential employee, or is estopped from doing so. Having determined that Ward is not a confidential employee under Board law, I find it unnecessary to decide that question.

¹⁷ To file the request for review electronically, go to www.nlrb.gov and select the **E-Gov** tab. Then click on the **E-Filing** link on the menu. When the E-File page opens, go to the heading **Board/Office of the Executive Secretary** and click on the "File Documents" button under that heading. A page then appears describing the E-Filing terms. At the bottom of this page, check the box next to the statement indicating that the user has read and accepts the E-Filing terms and click the "Accept" button. Then complete the filing form with information such as the case name and number, attach the document containing the request for review, and click the Submit Form button. Guidance for E-filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter and is also located under "E-Gov" on the Board's web site, www.nlrb.gov.

DATED at Buffalo, New York this 27th day of May, 2008.

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